

ESTTA Tracking number: **ESTTA671932**

Filing date: **05/13/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91212680
Party	Defendant Real Foods Pty Ltd
Correspondence Address	BRUCE S LONDA NORRIS MCLAUGHLIN & MARCUS PA 875 3RD AVENUE, 8TH FLOOR NEW YORK, NY 10022-6225 UNITED STATES jhamburg@nmmlaw.com, bcmarin@nmmlaw.com, abhatt@nmmlaw.com
Submission	Motion to Amend/Amended Answer or Counterclaim
Filer's Name	Ami Bhatt
Filer's e-mail	abhatt@nmmlaw.com, jhamburg@nmmlaw.com, bcmarin@nmmlaw.com
Signature	/ami bhatt/
Date	05/13/2015
Attachments	Amended Answer (RICE THINS).pdf(238252 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of U.S. Trademark Application Serial No. 85/820051

For the mark RICE THINS

Published in the *Official Gazette* on May 28, 2013

FRITO-LAY NORTH AMERICA, INC.

Opposer,

vs.

REAL FOODS PTY LTD.

Applicant.

Opposition No. 91212680

**AMENDED ANSWER TO AMENDED NOTICE OF
OPPOSITION AND AFFIRMATIVE DEFENSES**

Applicant Real Foods Pty Ltd. for its Amended Answer to the Amended Notice of
Opposition (“Notice of Opposition”) filed in this proceeding, by its attorneys, states as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1 of the Notice of Opposition.
2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2 of the Notice of Opposition.
3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 3 of the Notice of Opposition.
4. Admits the allegations set forth in paragraph 4 of the Notice of Opposition.

COUNT I: GENERICNESS

5. Denies the allegations of paragraph 5 of the Notice of Opposition.

6. Admits that RICE was disclaimed from the Application and admits that RICE is descriptive, but otherwise denies the allegations set forth in paragraph 6 of the Notice of Opposition.

7. Denies the allegations set forth in paragraph 7 of the Notice of Opposition.

8. Denies the allegations set forth in paragraph 8 of the Notice of Opposition.

9. Admits that Applicant did not disclaim the term THINS in its Application, and, except as so admitted, denies the allegations of paragraph 9 to the extent they state or imply that Applicant was required to disclaim such term. Applicant denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in paragraph 9 of the Notice of Opposition.

10. Denies the allegations set forth in paragraph 10 of the Notice of Opposition.

11. Denies the allegations set forth in paragraph 11 of the Notice of Opposition.

12. Denies the allegations set forth in paragraph 12 of the Notice of Opposition.

COUNT II: TRADEMARK INCAPABILITY

13. Denies the allegations set forth in paragraph 13 of the Notice of Opposition.

COUNT III: MERE DESCRIPTIVENESS

14. Denies the allegations set forth in paragraph 14 of the Notice of Opposition.

15. Denies the allegations set forth in paragraph 15 of the Notice of Opposition.

16. Denies the allegations set forth in paragraph 16 of the Notice of Opposition.

17. Admits that Applicant did not provide proof of acquired distinctiveness during the prosecution of the application before the U.S. Patent and Trademark Office (“USPTO”), as such was not required by the examining attorney. Denies the remaining allegations set forth in paragraph 17 of the Notice of Opposition.

18. Admits that registration of the Application would provide *prima facie* exclusive rights to Applicant to use the Mark. Applicant otherwise denies the allegations set forth in paragraph 18 of the Notice of Opposition.

19. Denies the allegations set forth in paragraph 19 of the Notice of Opposition.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

20. Applicant has continuously used the Mark since the time of Applicant's adoption thereof, on or before about 2007, and as a result the Mark has developed significant goodwill and widespread usage among the consuming public.

21. Since Applicant's adoption of the Mark, Applicant has had extensive sales, distribution, advertising and promotion in U.S. commerce in relation to the goods set forth in Application No. 85/820051.

22. In addition, Applicant has continuously used the related mark CORN THINS for similar goods since on or before about 1999 throughout the United States.

23. As a result of its continuous and substantially exclusive use of the mark RICE THINS and the related mark CORN THINS, both in U.S. commerce for at least five years, Applicant has established *prima facie* acquired distinctiveness in the mark RICE THINS under Section 2(f) of the Lanham Act, 15 U.S.C. § 1052(f).

24. As a result of its continuous and substantially exclusive use of the mark RICE THINS and the related mark CORN THINS, the relevant consuming public has come to view Applicant's mark RICE THINS as deriving from a unique source, and Applicant therefore has acquired distinctiveness and secondary meaning among the consuming public so that it

designates Applicant as the exclusive source of the goods set forth in Application No. 85/820051.

25. By virtue of the foregoing, and without prejudice to Applicant's denials set forth, Applicant asserts as an affirmative defense that the Mark has acquired distinctiveness and secondary meaning pursuant to Section 2(f) of the Lanham Act, 15 U.S.C. § 1052(f).

SECOND AFFIRMATIVE DEFENSE

26. The Notice of Opposition fails to state a claim upon which relief may be granted.

Wherefore, Applicant requests that the Opposition be denied, and that the application proceed to registration.

Dated: New York, New York
May 13, 2015

Respectfully submitted,



Bruce S. Londa
Jeanne M. Hamburg
Ami Bhatt
NORRIS, McLAUGHLIN & MARCUS, P.A.
Attorneys for Applicant, Real Foods Pty Ltd.
875 Third Avenue, 8th Floor
New York, New York 10022
Phone: (212) 808-0700

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of U.S. Trademark Application Serial No. 85/820051
For the mark RICE THINS
Published in the *Official Gazette* on May 28, 2013

FRITO-LAY NORTH AMERICA, INC.

Opposer,

vs.

REAL FOODS PTY LTD.

Applicant.

Opposition No. 91212680

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2015, a copy of the foregoing Amended Answer to Amended Notice of Opposition is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed as follows:

WILLIAM G. BARBER
PIRKEY BARBER PLLC
600 CONGRESS AVENUE, SUITE 2120
AUSTIN, TX 78701



Ami Bhatt